STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

v.) No. 101231 (Pendleton County 98-F-19)

Ferlin Jay Heavener
Defendant Below, Petitioner

FILED
April 1, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Ferlin Jay Heavener timely appeals from the circuit court's re-sentencing order and its order denying his motion to set aside his guilty pleas filed pursuant to Rule 32(e) of the West Virginia Rules of Criminal Procedure. These orders were entered following a remand from this Court for the appointment of counsel and resentencing of petitioner for purposes of appeal. Respondent State of West Virginia has filed a timely response, and petitioner has filed a reply.

This Court has considered the parties' briefs and the record on appeal. Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this case is appropriate for consideration under the Revised Rules. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

I. Facts

On November 4, 1998, petitioner was indicted on sixty-one counts of third degree sexual assault involving five minors; sixty counts of delivery of a Schedule I controlled substance (marijuana); and one count of first degree sexual assault. On January 15, 1999, he pled guilty to twenty counts of third degree sexual assault involving two of the minors and five counts of delivery of a Schedule I controlled substance. Petitioner was sentenced to one to five years of incarceration on each of the twenty-five convictions. The sex-related offenses were ordered to run consecutively with each other and the drug-related sentences

concurrently resulting in an effective sentence of twenty to 100 years. Petitioner filed a motion pursuant to Rule 35(b) of the West Virginia Rules of Criminal Procedure seeking a reduction of sentence, but asked the circuit court to postpone ruling on the motion. Ultimately, a hearing was held on the motion on June 7, 2007, and the circuit court entered an order on June 25, 2007, denying the motion. Petitioner appealed the denial of his Rule 35 motion, which was refused by this Court on January 24, 2008.

On August 3, 2009, defendant filed a motion in the circuit court for formal re-sentencing to reinstate his appeal rights, which was denied by the circuit court. Petitioner appealed that decision to this Court and, on January 14, 2010, this Court remanded the case for appointment of counsel and re-sentencing for purposes of appeal. Prior to the re-sentencing on remand, petitioner filed a motion pursuant to Rule 32(e) of the West Virginia Rules of Criminal Procedure seeking to withdraw his guilty pleas. In an order entered on April 8, 2010, the circuit court denied the Rule 32(e) motion. On April 10, 2010, the circuit court held a hearing on the re-sentencing and, by order entered on April 27, 2010, petitioner was resentenced for purposes of this appeal.[1]

II. Rule 32(e) Motion

A trial court's decision on a motion under Rule 32(d) of the West Virginia Rules of Criminal Procedure will be disturbed only if the court has abused its discretion. Syl. Pt. 2, *Duncil v. Kaufman*, 183 W.Va. 175, 394 S.E.2d 870 (1990).[2]

While on remand for the purpose of re-sentencing, petitioner filed a motion pursuant to Rule 32(e) seeking to set aside his guilty pleas on three grounds: (1) his pleas were induced by threats of the prosecutor; (2) he was indicted and sentenced on the basis of invalid and inaccurate police interviews; and (3) he received ineffective assistance of counsel during plea negotiations and sentencing**.** On April 8, 2010, the circuit court entered an order denying the motion, without a hearing, on the basis of petitioner's prior, sworn admissions at his plea hearing that he understood his plea agreement, that no promises or threats induced his plea, and that he was satisfied with his legal representation. The circuit court relied upon Syllabus Point 2 of *State v. Harlow*, 176 W.Va 559, 346 S.E.2d 350 (1986), and Syllabus Point 3 of *State v. Olish*, 164 W.Va. 712, 266 S.E.2d 134 (1980), in finding substantial

[1] Prior to re-sentencing, petitioner filed a petition for a writ of habeas corpus in the circuit court on December 15, 2009, which was stayed until the present appeal is completed.

[2] Following the amendment of Rule 32 in 1996, what is cited as "Rule 32(d)" in *Duncil* is now Rule 32(e).

prejudice to the State if petitioner were allowed to withdraw his guilty pleas after the passage of twelve years.

Petitioner asserts that the circuit court's reliance on *Harlow* and *Olish* is misplaced because there was no physical evidence against him—only witness interviews. Petitioner argues that the State will not be prejudiced because he believes that all witnesses against him are still available to testify. Petitioner further argues that the circuit court's refusal to hold a hearing on his motion was a denial of due process. Conversely, the State argues that the circuit court was clearly within its discretion in denying the Rule 32(e) motion, which petitioner should have filed after the entry of his guilty pleas in 1999, but before his original sentencing. Under Rule 32(e), after sentencing, a plea may be set aside only on direct appeal or through a habeas petition.

In this Court's order entered on January 14, 2010, it remanded this matter to the circuit court for "appointment of counsel and resentencing of petitioner for purposes of appeal." Contrary to petitioner's argument, this is not an issue of first impression. This Court's remand order did not reopen a door that has been closed to petitioner since his original sentencing in 1999. Petitioner's Rule 32(e) motion was untimely, and the circuit court did not abuse its discretion in denying the same without a hearing.[3]

III. Mandatory Probation for first Drug Offense

"'Moot questions or abstract propositions, the decision of which would avail nothing in the determination of controverted rights of persons or of property, are not properly cognizable by a court.' Syl. pt. 1, *State ex rel. Lilly v. Carter*, 63 W. Va. 684, 60 S. E. 873 (1908). *Accord* Syl. pt. 1, *Tynes v. Shore*, 117 W. Va. 355, 185 S. E. 845 (1936)." *State ex rel. Wooten v. The Coal Mine Safety Board of Appeals and William Coulson*, 226 W.Va. 508, 703 S.E.2d 280, 286 (2010).

Under West Virginia Code §60A-4-402(c), any first offense for distributing less than fifteen grams of marijuana without any remuneration is to be disposed of under West Virginia Code §60A-4-407, which provides for probation. *Accord* Syl. Pt. 2, *State v. Carper*, 176 W.Va. 309, 342 S.E.2d 277 (1986) ("W.Va. Code, 60A-4-402(c), mandates that a defendant guilty of a first offense for distributing less than fifteen grams of marihuana

[3] Petitioner can seek to set aside his guilty pleas in a habeas proceeding filed in the circuit court. During an omnibus hearing, petitioner will be able to present evidence and witness testimony addressing the issues raised in his untimely Rule 32(e) motion filed below. This Court expresses no opinion on the merits of such habeas petition.

without any remuneration is entitled to mandatory probation under W.Va. Code, 60A-4-407"). Petitioner states that as a first time drug offender whose "delivery" was sharing a "bowl" of marijuana with others, without remuneration, when it is "fairly well known" that a "bowl" contains less than fifteen grams, entitled him to probation for the drug offenses under *Carper*. *Id.* Petitioner adds that even if sex is considered his remuneration, he should still be considered for probation under Syllabus Point 6 of *State v. Nicastro*, 181 W.Va. 556, 383 S.E.2d 521 (1989). The State asserts that any challenge to petitioner's drug-related sentence is moot. This Court agrees.

The circuit court's sentencing order entered on April 27, 2010, provides that petitioner's drug-related sentences "shall run concurrently with each other and concurrently with the sentences for 'Sexual Assault in the Third Degree.'" Petitioner's effective sentence date was January 1, 1999. Accordingly, his one to five year sentences of incarceration for the drug-related offenses have been discharged.

Even if petitioner's sentences for his drug-related offenses had not been discharged, mandatory probation under West Virginia Code §60A-4-402(c) would not apply given petitioner's simultaneous convictions on 20 counts of third degree sexual assault. In Syllabus Point 13 of *State v. Broughton*, 196 W.Va. 281, 470 S.E.2d 413 (1996), this Court stated that "[w]here a first-time offender who otherwise falls within the purview of *State v. Nicastro* 181 W.Va. 556, 383 S.E.2d 521 (1989), is simultaneously convicted of a marijuana violation **and a more serious offense**, failure to consider the factors outlined in *Nicastro* is not reversible error." (Emphasis added.)

IV. Order of Restitution

"The Supreme Court of Appeals reviews sentencing orders, including orders of restitution made in connection with a defendant's sentencing, under a deferential abuse of discretion standard, unless the order violated statutory or constitutional commands." *State v. Lucas*, 201 W.Va. 271, 276, 496 S.E.2d 221, 226 (1997).

In the circuit court's original sentencing order and in the sentencing order entered on remand, petitioner was ordered to reimburse the State in the amount of $144,164[4] for the cost

[4] Petitioner states that the amount of restitution should have been $140,160.16. If there has been a clerical error in this regard, it can surely be resolved by the circuit court without this Court's involvement. *See* Rule 36, W.V.R.Crim.P. ("Clerical mistakes in judgments, orders or other parts of the record . . . may be corrected by the court at any time . . . .")

of the psychiatric treatment received by one of his victims, who was eleven-years-old at the time of his first sexual assault by petitioner. Petitioner argues that he is unable to pay the restitution either now or in the foreseeable future and that restitution was ordered without any analysis or hearing, as required by *Lucas*, which violated his due process rights. *Id.*

Petitioner's indigence is not determinative of the amount of restitution imposed, nor is a court required to spread its findings and conclusions on the record in every case in which full restitution is ordered. *Id.* Based upon a review of the record and the argument of counsel, this Court cannot find that the circuit court abused its discretion in this regard.

V. Sentencing

"'Sentences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor, are not subject to appellate review.' Syllabus Point 4, *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982)." Syl. Pt. 4, *State ex rel. Hatcher v. McBride*, 221 W.Va. 760, 656 S.E.2d 789 (2007) (per curiam).

Petitioner argues that his effective sentence of twenty to 100 years in prison is disproportionate to the character and degree of the offenses for which he was convicted and violates the proportionality clause and the ban on cruel and unusual punishment in the West Virginia and United States Constitutions. Petitioner cites *State v. Cooper*, 172 W.Va. 266, 304 S.E.2d 851 (1983), for the proposition that under the subjective test, the question is whether his sentences shock the conscience of court and society. If it does, then his sentences are disproportionate and the inquiry ends. If they do not, then petitioner asserts that his sentences are to be evaluated under the objective test set forth in Syllabus Point 5 of *Wanstreet v. Bordenkircher***,** 166 W.Va. 523, 276 S.E.2d 205 (1981).

Under the subjective test, petitioner notes his ties to the community and his lack of any prior convictions. He asserts that while his crimes were serious, they were not the worst form of sex offense, nor do they compare to murder. Petitioner asserts a murderer sentenced to life with mercy will have an opportunity for parole five years earlier than he will.

Under the objective test, petitioner asserts that his aggregate sentence is disproportionate under *Wanstreet*. *Id.* He states that third degree sexual assault is a less serious offense than other sex crimes or murder; that the statutory punishment for third degree sexual assault is meant to be less than the sentence for first or second degree sexual assault or murder; that his convictions on twenty counts of third degree sexual assault were against only two victims and were consensual; and that his "Proportionality Analysis," in which he compares his sentences to those sentences imposed on twenty-three other

defendants charged with sexual offenses in other jurisdictions in West Virginia, shows that his sentencing was objectively higher.[5]

The record reflects that the circuit court acted within the statutory limits in sentencing petitioner on each of the counts to which he pled guilty and did not base its decision on any impermissible factor. As such, petitioner's sentences are not subject to review. Assuming, *arguendo*, that petitioner's sentences were subject to review, they are not disproportionate to his offenses. Petitioner was a school teacher who sexually abused minor males on numerous occasions after first enticing them with marijuana. Under the facts of this case, petitioner's sentences do not shock the conscience nor has the circuit court abused its discretion in this regard.

VI. Conclusion

Having reviewed the record and the parties' arguments on appeal under the pertinent standards of review, this Court finds no error or abuse of discretion. Accordingly, we affirm.

Affirmed.

ISSUED: April 1, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh

[5] It appears from the record that petitioner did not present his "Proportionality Analysis" to the circuit court for its consideration. Accordingly, this Court will not address the same.